# Fiden Electrical Engineering Sdn Bhd v Nippon Seiko KK & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22–164 OF 1992
ABDUL MALIK ISHAK J
8 JUNE 2004

*Civil Procedure — Writ — Renewal — Whether should be allowed after limitation period has set in*

*Civil procedure — Service — Service out of jurisdiction — Concurrent writ — Notice of concurrent writ — Japan — Proper mode to be used*

*Civil procedure — Service — Service out of jurisdiction — Concurrent writ — Notice of concurrent writ — Order — Whether service of draft unsealed and unsigned copies proper*

*Civil procedure — Service — Service out of jurisdiction — Concurrent writ — Notice of concurrent writ — Whether service can be perfected by courier*

The plaintiff is a Malaysian incorporated company. The first defendant, on the other hand, is a company resident in Japan (a country with respect to which there does not subsist a Civil Procedure Convention providing for service). The plaintiff made three attempts to serve concurrent writ of summons and the notice of the concurrent writ of summons ('the legal documents') to the first defendant after many renewals over a prolonged and protracted period of approximately 11 years 5 months and 27 days. The three attempts were: (i) On 15 October 1991, when the first defendant received a letter by registered post from the Malaysian consular office in Tokyo, Japan where the first defendant was asked to collect the legal documents direct from the Malaysian embassy in Tokyo without intervention by the courts of Japan; (ii) On 7 February 2000, when the District Court of Tokyo sent draft copies of the legal documents with order of the court to serve out of jurisdiction and request to serve out of jurisdiction amongst which there were documents not sealed by the court nor signed by the plaintiff's solicitors; and (iii) On 8 May 2001, when the first defendant received by way of courier directly from the plaintiff's solicitors, the legal documents, a request to serve out of jurisdiction, an order of the court extending the validity of the writ with respective Japanese translations. Some of these documents were also not sealed by the court and signed by the plaintiff's solicitors.

The first defendant applied to court for an order that the issuance and the purported service of the legal documents on the first defendant be set aside. The learned deputy registrar refused to allow it. Aggrieved, the first defendant filed this appeal to the judge in chambers.

**Held**, allowing first defendant's appeal:

(1) Malaysian and Japanese laws do not permit service of foreign legal process direct by way of courier and this must be struck down as bad service. Service in Japan can only take place in the following manner:

through the competent District Court, by special mail service and through the Japanese Supreme Court (see para 5).

(2) Drafts of the legal documents which were sent but not served by the plaintiff did not comply either with the laws of Malaysia or the laws of Japan: O 92 r 2 of the Rules of the High Court 1980. It is is an incurable irregularity in that such service would be considered as a nullity (see paras 43 and 73).

(3) As a result of many renewals, the defence of limitation that was once available to the first defendant cannot now be raised by the first defendant and they have suffered serious prejudice as a result . Limitation should be a factor to take into consideration in any application for the renewal of the writ of summons (see para 46).

[**Bahasa Malaysia summary**

Plaintif adalah adalah syarikat yang ditubuhkan di Malaysia. Manakala, defendan pertama adalah syarikat yang bermastautin di Jepun (negara yang tidak mempunyai konvensyen prosedur sivil). Plaintif telah membuat tiga percubaan untuk menyampaikan writ saman bersama dan notisnya (kertas kuasa) kepada defendan pertama selepas banyak kali ia diperbaharui dalam tempoh yang panjang dan lama lebih kurang 11 tahun 5 bulan 27 hari. Tiga percubaan itu adalah: (i) Pada 15 Oktober 1991 bila defendan pertama menerima surat berdaftar daripada pejabat konsular Malaysia di Tokyo, Jepun memintanya untuk mengambil kertas kuasa terus dari Kedutaan Malaysia di Tokyo tanpa Mahkamah Jepun masuk campur; (ii) Pada 7 Februari 2000, bila Mahkamah Daerah Tokyo menghantar salinan draf kertas kuasa dengan perintah mahkahmah untuk menyampaikan di luar bidangkuasa dan permohonan untuk menyampaikan di luar bidangkuasa di mana terdapat antara dokumen-dokumen ini tidak dimeterai oleh Mahkamah dan tidak ditandatangani oleh peguamcara plaintif; (iii) Pada 8 Mei 2001, defendan pertama menerima surat melalui courier terus dari peguamcara plaintif yang mengandugi kertas kuasa, permohonan untuk menyampaikan di luar bidangkuasa, perintah mahkamah malanjutkan tempoh writ dengan penterjemaan Jepun masing-masing. Beberapa dokumen ini tidak dimeterai oleh Mahkamah dan juga tidak ditandatangani oleh peguamcara plaintif.

Defendan pertama memohon kepada Mahkamah untuk perintah bahawa pengeluaran dan penyampaian kertas kuasa terhadap defendan pertama diketepikan. Timbalan Pendaftar yang bijaksana enggan membenarkannya. Defendan pertama failkan rayuan ini kepada hakim dalam kamar.

**Diputuskan**, membenarkan rayuan defendan pertama:

(1) Undang-undang Malaysia dan Jepun tidak membenarkan penyampaian proses undang-undang luar negara terus melalui courier dan harus dibatalkan kerana penyampaian tidak baik. Servis di Negara Jepun hanya boleh dilakukan dengan cara: melalui Mahkamah Daerah, mel khas dan melalui Mahkamah Agong (lihat perenggan 5).

(2) Draf kertas kuasa yang dihantar tetapi tidak diserah oleh plaintif tidak mengikut undang-undang Malaysia dan Jepun: A 92 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980. Ia adalah ketidakaturan yang tidak boleh diubati dan penyampaian sebegitu akan dianggap terbatal (lihat perenggan 43 dan 73).

(3) Atas sebab diperbaharui banyak kali, pembelaan had masa yang suatu ketika terdapat untuk defendaan pertama tidak boleh dibangkitkan oleh defendan pertama sekarang dan mereka telah diprejudiskan dengan teruk. Had masa adalah satu faktor yang harus diambilkira dalam sebarang permohonan untuk writ saman diperbaharui (lihat perenggan 46).]

**Notes**

For cases on service out of jurisdiction, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5270–5297

**Cases referred to**

*Abraham v Jutsun* [1963] 2 All ER 402 (refd)
*Afro Continental Nigeria Ltd v Meridian Shipping Co SA* (*The 'Vrontados'*) [1982] 2 Lloyd's Rep 241(refd)
*Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188 (refd)
*Balogh v Crown Court at St Albans* [1975] QB 73 CA (refd)
*Battersby & Ors v Anglo-American Oil Company, Limited & Ors* [1944] 1 KB 23 CA (refd)
*Brandon v Dowager Baroness Michelham* (1919) 35 TLR 617 (refd)
*Cheang Chan as Chairman of Perak Kwong Sai Association v Lee Kin Kok* [1959] 2 MLJ 242 (refd)
*Gay v Hancock* (1887) 56 LT 726 (refd)
*H v H* [1928] P 206 (refd)
*Harriman v Harriman* [1909] P 123, CA (refd)
*Hopgood v Brown* [1955] 1 All ER 550; [1955] 1 WLR 213 CA (refd)
*Lee Kah Hong & Anor v Teoh Tiang Guan & Anor* [1971] 2 MLJ 223 (refd)
*Linwood v Andrews and Moore* (1888) 58 LT 612 (refd)
*Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27 (refd)
*Low v Bouverie* [1891] 3 Ch 82 (refd)
*Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247, 1956] 1 WLR 29 CA (refd)
*Maclaine v Gatty* [1921] 1 AC 376 (refd)
*Maclaine Stokvis (Malaya) Ltd v The Saloma Company* [1959] MLJ 241 (refd)
*Maritime (Pte) Ltd v ETPM SA* [1988] 2 MLJ 289 (refd)
*New Ching Kee v Lim Ser Hock* [1975] 2 MLJ 183 (refd)
*Ong & Company Pte Ltd v Carl YL Chow* [1987] 2 MLJ 430 (folld)
*R v Weisz, ex p Hector MacDonald* [1951] 2 KB 611; [1951] 2 All ER 408 (refd)
*Re Busfield* (1886) 32 ChD 123(refd)
*Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618 (refd)
*Re Sugden's Trusts, Sugden v Walker* [1917] 1 Ch 510 (refd)
*Schothorst and Schuitema v Franz Dauter GmbH (The 'Nimrod')* [1973] 2 Lloyd's Law Reports 91 (refd)

*Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146 (folld)
*Syn Min Kong Sdn. Bhd v Hua Seng Sawmill Co Bhd* [1981] 1 MLJ 269 (refd)
*Wilson v Raffalovich* (1881) 7 QBD (refd)
*Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741; [1972] 2 All ER 271 (refd)

**Legislation referred to**

The Code of Civil Procedure (Law No 109, June 26, 1996) (Japan)
Rules of the High Court 1980 O 10 r 1, O 11 r 5, 5(2), 5(3), 6(2)(b)(ii), O 12 r 7, O 92 r 2

*Thangasvarin Suppiah (Kean Chye & Sivalingam) for the plaintiff*
*Rishwant Singh (Shearn Delamore & Co) for the first defendant*

**Abdul Malik Ishak J:**

*Introduction*

**[1]** The first defendant by the name of Nippon Seiko KK is a company resident in Japan and the plaintiff seeks to serve the concurrent writ of summons and the notice of the concurrent writ of summons (hereinafter referred to as the 'legal documents') on the first defendant. How must the plaintiff effect the service of the legal documents on the first defendant bearing in mind that the latter is a company resident in the land of the rising sun? The land of the famous samurai is certainly a distance away from Malaysia. This judgment revolves on service of the legal documents on the first defendant and its ramifications thereto.

*Background Scenario*

**[2]** Enclosure 164 was the first defendant's application pursuant to O 12 r 7 of the Rules of the High Court 1980 ('RHC') for an order that the issuance and the purported service of the legal documents on the first defendant be set aside. The learned deputy registrar heard enclosure 164 and she refused to allow it. Aggrieved, the first defendant filed an appeal to the Judge in chambers in enclosure 176. In dismissing enclosure 164, the learned deputy registrar gave no reasons for doing so.

**[3]** It now falls on me to decide enclosure 176. For starters, I have this to say.

**[4]** O 12 r 7 of the RHC confers a statutory right on the first defendant. It is a substantive right. The first defendant has an unqualified right to enter a conditional appearance and thereafter, within the time limited, to apply to the court for an order to set aside service of the legal documents. O 12 r 7 of the RHC is worded in the following manner:

> Application to set aside writ, etc (O 12 r 7)
>
> (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after

entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.

(2) An application under this rule must be made by summons.

**[5]** *It must be recalled that the first defendant is a company resident in Japan.* The plaintiff, on the other hand, is a Malaysian incorporated company. The service of the legal documents, which the first defendant is disputing and which is also the subject matter of the application in enclosure 164 and the appeal in enclosure 176, took place on 8 May 2001 (see exhibit 'MI-1' of enclosure 165). The plaintiff purported to serve the legal documents on the first defendant in Japan via courier. I say categorically that Malaysian and Japanese laws do not permit service of foreign legal process direct by way of courier. I too say that service in Japan can only take place in the following manner: through the competent District Court, by special mail service and through the Japanese Supreme Court.

**[6]** I will now say something about the second and the third defendants. It would be germane to state that on 28 October 1991, the suit against the second defendant was withdrawn. In so far as the third defendant is concerned, the matter is still ongoing and it is at the stage of case management as reflected in enclosure 177.

**[7]** I will pause here for a moment. I now propose to set out the chronology of events in relation to the various attempts at service of the legal documents by the plaintiff. It is certainly appropriate for me to do so.

*Chronology of events*

| | | |
|---|---|---|
| 28 June 1989 | - | Letter from Messrs McKenna & Co to the plaintiff's solicitors. |
| 29 June 1989 | - | Letter from Messrs Mitsuyoshi Kumagai to Messrs McKenna & Co |
| 3 July 1989 | - | Letter from Messrs McKenna & Co to the plaintiff's solicitors. |
| 11 November 1989 | - | Date of filing of this suit |
| 27 July 1991 | - | Letter from the Jabatan Kehakiman Malaysia to the Foreign Ministry. |
| 10 August 1991 | - | Letter from the plaintiff's solicitors to Jabatan Kehakiman Malaysia. |
| 6 September 1991 | - | Letter from Jabatan Kehakiman Malaysia to the Ministry of Foreign Affairs. |

| | | |
|---|---|---|
| 7 Ocotber 1991 | - | Letter from the plaintiff's solicitors to the Ministry of Foreign Affairs. |
| 8 October 1991 | - | Letter from the plaintiff's solicitors to the Ministry of Foreign Affairs. |
| 28 October 1991 | - | Memorandum from the Malaysian Embassy to the Consular Department of the Foreign Ministry. |
| 30 July 1992 | - | Letter from the plaintiff's solicitors to Jabatan Kehakiman Malaysia. |
| 17 September 1992 | - | Letter from the Supreme Court to the plaintiff's solicitors. |
| 23 March 1993 | - | Letter from the plaintiff's solicitors to Jabatan Kehakiman Malaysia. |
| 12 October 1995 | - | Letter from the plaintiff's solicitors to Ketua Pendaftar, Jabatan Kehakiman Malaysia. |
| 19 May 1998 | - | Letter from the Federal Court Malaysia to the Ministry of Foreign Affairs. |
| 2 June 1998 | - | Letter from the plaintiff's solicitors to the Ministry of Foreign Affairs. |
| 9 September 1998 | - | Letter from the plaintiff's solicitors to the Ministry of Foreign Affairs. |
| 31 October 1998 | - | Letter from the plaintiff's solicitors to the Federal Court, Malaysia. |
| 3 November 1998 | - | Letter from Wisma Putra, Ministry of Foreign Affairs to Malawakil Tokyo. |
| 3 November 1998 | - | Letter from the Federal Court Malaysia to the Consular Department Ministry of Foreign Affairs. |
| 3 December 1998 | - | Letter from the plaintiff's solicitors to the Federal Court, Malaysia. |
| 25 January 1999 | - | Letter from the plaintiff's solicitors to the competent court of Japan. |
| 10 February 1999 | - | Letter from the plaintiff's solicitors to Ketua Pendaftar, Federal Court. |
| 14 March 2000 | - | Note from the Ministry of Foreign Affairs in Japan to the Malaysian Embassy in Japan. |
| 20 March 2000 | - | Letter from Wisma Putra, Ministry of Foreign Affairs to the plaintiff's solicitors. |

**[8]** The chronology of events are certainly food for thought. Concerted attempts were made but they all came to naught – legally speaking, of course.

*The Plaintiff's Attempts at Service of the Legal Documents*

**[9]** Now, between 11 November 1989 to 8 May 2001 – over a prolonged and protracted period of approximately 11 years 5 months and 27 days, the plaintiff attempted service of the legal documents onto the first defendant as many as three (3) times in the following situations:

(i) On 15 October 1991, when the first defendant received a letter by registered post from the Malaysian consular office in Tokyo, Japan where the first defendant was asked to collect the legal documents direct from the Malaysian embassy in Tokyo without intervention by the courts of Japan. And this must be read with the averment of Choy Khai Leong in the affidavit in enclosure 174 at paragraph 6 which alludes to the purported service on 23 October 1991 (hereinafter referred to as the 'first attempt').

(ii) On 7 February 2000, when the District Court of Tokyo sent a copy of:

(a) the notice of the concurrent writ of summons which is to be served out of jurisdiction;

(b) the concurrent writ of summons to be served out of jurisdiction;

(c) the High Court order dated 23 December 1997 which appeared to allow the plaintiff leave to issue and serve the notice of the concurrent writ of summons which has to be served out of jurisdiction onto the first defendant; and

(d) the request to serve the legal documents out of jurisdiction.

Interestingly, it would be germane to mention that the documents referred to in paragraphs (a) to (d) above were merely draft documents. Even some of these draft documents were not signed by the plaintiff's solicitors nor signed nor sealed by the court (see paragraph 12 and exhibit 'MI-3' of enclosure 172 – hereinafter these would be referred to as the 'second attempt').

(iii) On 8 May 2001, the first defendant received a letter dated 3 May 2001 by way of courier directly from the plaintiff's solicitors. That courier contained the following documents:

(a) a concurrent writ of summons dated 23 February 1998 in the English language as well as in the Japanese language;

(b) a notice of the concurrent writ of summons in the English language as well as in the Japanese language but it was undated and it was not signed by the plaintiff's solicitors nor signed by the court and it was also unsealed;

(c) a request to serve out of jurisdiction dated 29 October 1996 in the English language and in the Japanese language; and

(d) an order of the court dated 11 December 2000 extending the validity of the writ dated 11 November 1989 from 11 November 2000 to 10 May 2001 in two languages – Bahasa Malaysia and Japanese.

**[10]** All these may be appreciated by referring to paragraph 4 of enclosure 165 as well as exhibit 'MI-1' annexed to enclosure 165 (hereinafter referred to as the 'third attempt').

*The Applicable Law in regard to the Service of Process on the First Defendant*

**[11]** By virtue of O 10 r 1 of the RHC, the general rule is that the service of process must be in the nature of a personal service *on the first defendant and that Order states as follows* (the relevant parts only):

> (1) Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant …

**[12]** Reference should also be made to O 11 r 5 of the RHC. That Order states the manner in which a notice of the writ abroad has to be served. Put differently, it relates to the manner in which a notice of the writ is to be served out of jurisdiction and it is worded in this way (the relevant parts only):

> 5 Service of notice of writ abroad: General (O 11 r 5)
>
> (1) Subject to the following provisions of this rule, Order 10 rule 1 and Order 62 rule 5, shall apply in relation to the service of a notice of a writ notwithstanding that the notice is to be served out of the jurisdiction.
>
> (2) Nothing in this rule or in any order or direction of the Court made by virtue of shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.
>
> (3) A notice of a writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected.

**[13]** Now, the applicable law relating to service of process in Japan is two-fold:

(1) Law Relating To The Reciprocal Judicial Aid To Be Given At The Request Of Foreign Courts (Law No: 63 of the 38th year of Meiji (13 March, 1905), as amended by Law No: 7 of the 45th year of Meiji (29 March, 1912) and by Law No: 17 of the 13th year of Showa (22 March, 1938)) (hereinunder referred to as the 'Japanese Law'); and

(2) The Code Of Civil Procedure (Law No: 109, June 26, 1996) (hereinafter referred to as the 'Japanese Code').

**[14]** Art 1 of the Japanese Law enacts as follows:

> A Court shall, at the request of a Foreign Court, render judicial aid in serving papers or taking evidence in connection with cases on civil or criminal matters.

The said judicial aid shall be given by the District Court which has jurisdiction over the place where the required proceedings are to take place.

**[15]** The Japanese Code, on the other hand, states that the proper mode of service in Japan is when the process is served on the first defendant through the competent District Court, by special mail delivery, and through the Supreme Court of Japan.

**[16]** Now, the affidavit of Choy Khai Leong that was affirmed on 31 July 2001 on behalf of the plaintiff as seen in enclosure 170 makes for interesting reading material. That affidavit makes reference to and annexes a letter dated 28 June 1989 addressed to Richard J Curl, Esq, McKenna & Co at Toyo Kaiji Building No 3, 7th Floor, 2-23-1 Nishi Shinbashi Minato-Ku, Tokyo. That letter is marked as exhibit 'CKL-23' to enclosure 170 and it is worded as follows:

June 29, 1989

Re: Service of Foreign Process on a Japanese Company

Dear Mr. Curl:

I reply to your fax of 28th June 1989.

On my brief study on the above matter, I have not found any evidence indicating Malaysia is a signatory to the Service Abroad Convention or the Civil Procedure Convention nor any treaty between Malaysia and Japan regarding the judicial cooperation

Under the Judicial Cooperation Upon Foreign Court's Request Act enacted in 1905, as amended, a district court in Japan having relevant jurisdiction shall, inter alia, make legal assistance for service of documents relating to civil litigations in accordance with a foreign court's request if the following conditions are satisfied:

(1) The request must be made through a diplomatic authority;

(2) The request for service of documents must be made in documents specifying full name, nationality and domicile (or dwelling place);

(3) The request and any other documents made in any language other than Japanese must accompany their Japanese translation;

(4) The nation of the foreign court requesting the assistance undertakes to guarantee the reimbursement of any cost and expenses necessary for performing the service of documents; and

(5) The nation of the foreign court requesting the assistance undertakes that the nation will provide legal assistance for the service of documents or for similar matters if a court in Japan requests for such legal assistance. (Reciprocity Clause).

If I can be of further assistance, please communicate with me.

Yours sincerely,

Sgd. (Illegible)

Mitsuyoshi Kumagai

**[17]** Richard J Curl, the English solicitor by letter dated 28 June 1989 wrote to Messrs Kean Chye & Sivalingam of 1st & 2nd floors, 8-10 Jalan Stesyen, 30000 Ipoh, Malaysia and his letter has been exhibited in enclosure 170 as exhibit 'CKL-23' and it is worded as follows:

28th June 1989

Dear Sirs,

Nippon Seiko K.K.

Thank you for your letter of 23rd June 1989 with attachment. In those cases where the plaintiff's country is a signatory to either the Civil Procedure Convention or the Service Abroad Convention, the procedure to be adopted in Japan is quite straightforward. Basically, it is necessary for a request to be made by the foreign court to the Japanese Ministry of Foreign Affairs for service of process to be made upon the defendant in Japan. The request is then transmitted to the relevant Japanese court which effects service in the normal fashion. Provision of translation of the writ and statement of claim is advisable.

In this case however the procedure to be adopted may be rather different as we understand that Malaysia is not a signatory to the relevant conventions. We are not Japanese attorneys and therefore are not competent to advise on matters of Japanese law or procedure. For this reason and bearing in mind the possible non-applicability of the convention procedure, we have instructed a Japanese attorney, Mr. Mitsuyoshi Kamagai to advise further on the particular procedure to be adopted in this case. We will therefore revert to you on receipt of that advice.

Yours faithfully,

Sgd. (Illegible)

Richard J. Curl

**[18]** There is another letter by Richard J Curl, the English solicitor, dated 3 July 1989 and it was addressed to Messrs Kean Chye & Sivalingam at the same address and this letter too has been exhibited as an exhibit in enclosure 170 and it is marked as 'CKL-23' and it is worded in this fashion:

3rd July 1989

Dear Sirs,

Nippon Seiko K.K.

Further to our letter of 28th June 1989 we enclose for your information a copy of a letter of advice dated 29th June 1989 received from Mr. Kumagai, the Japanese lawyer instructed by us on your behalf in this matter.

We understand that in the absence of any treaties or agreements between Malaysia and Japan regarding judicial co-operation, the Act referred to in Mr. Kumagai's letter has been construed as prohibiting a foreign state from effecting service in Japan in any manner other than through a Japanese court in accordance with the provisions of that Act. This is so even when the law of the foreign state permits other methods of service, such as service by consular offices or private persons or by mail sent directly to an addressee by a foreign court.

You will note that in order for service to be effected in Japan as per Mr. Kumagai's advice, it is necessary for the initial request to come from the relevant Malaysian court and for that request to be made by via diplomatic channels.

Please let us know if we can be of any further assistance to you.

Yours faithfully,

Sgd. (Illegible)

Richard J. Curl

**[19]** All these aptly show the proper mode of service under the prevailing laws of Japan – the land of the rising sun.

*The Plaintiff's First Attempt at Service of Legal Documents*

**[20]** It is interesting to note that the plaintiff admits that the service is bad. I must say that the plaintiff does not maintain either in its affidavits or in its submissions that the first attempt at service in 1991 – to be precise on 23 October 1991, constituted valid service. Choy Khai Leong in affirming an affidavit for the plaintiff on 18 September 2001 as seen in enclosure 174 at paragraph 6 categorically states as follows:

Saya merujuk kepada para 8, 9, 10 dan 11 Afidavit Kedua tersebut dan saya dinasihati oleh peguamcara Plaintif dan saya sesungguhnya percaya dan mengatakan bahawa penyerahan yang dilakukan pada 23.10.1991 adalah tidak teratur kerana Wisma Putra tidak mematuhi process penyerahan.

**[21]** So I say with a certain measure of confidence that nothing arises from this first attempt. In my judgment, the first attempt does not constitute service.

*The Second and Third Attempts by the Plaintiff in Serving the Legal Documents*

**[22]** It is apparent that the factual dispute centres on the second and third attempts at service. The first defendant entered a conditional appearance to the plaintiff's third attempt at service. The first defendant then took out an application to set aside the purported service of the legal documents. This application can be seen in enclosure 164 and, as I said, it was refused by the learned deputy registrar and it now comes up as an appeal before me in enclosure 176.

**[23]** In the third attempt, the plaintiff attempted to serve on the first defendant directly by way of a courier. The plaintiff was, at that time, under the false impression that such a mode of service was permitted by the then recent amendment to O 11 r 6(2)(b)(ii) of the RHC (amended by the Rules of the High Court 1980 (Amendment) 2000 PU (A) 342/2000) which states as follows:

> (2) Where in accordance with these rules notice of a writ is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the notice may be served –
>
> (a) through the Government of that country, where that Government is willing to effect service; or
>
> (b) except where service through a consular authority or by the plaintiff or his agent is prohibited by the law of that country –
>
> (i) through a Malaysian Consular authority in that country; or
>
> (ii) by the plaintiff or his agent.

**[24]** This is clearly demonstrated by the plaintiff's solicitors' two letters appearing and marked as exhibit 'TS-21' to the affidavit of Thangasvari a/p Suppiah that was affirmed on 9 May 2001 as seen in enclosure 155.

**[25]** As I said, in its third attempt at service which was done by way of courier, the plaintiff through Messrs Kean Chye & Sivalingam by letter emanating from Ipoh, Perak dated 3 May 2001 (see exhibit 'MI-1' annexed to the affidavit of Masao Ito, holder of Japanese passport no TE1596448 with a residential address at 2-17-2, Ehara-cho, Nakano-ku, 165-0023 Tokyo, Japan marked as enclosure 165 which was affirmed on 9 July 2001) and addressed to the first defendant in Tokyo, Japan expressly states as follows:

Ipoh Main, 3 May 2001

**By Courier**

Messrs. Nippon Seiko K.K.
Missei Building
6-3 Osaki 1 –Chome Shinagawa-Ku
141 0032 Tokyo
Japan

Dear Sirs,

Re: Kuala Lumpur High Court Suit No: D4-22-164-92
Fiden Electrical Engineering Sdn Bhd vs. Yourselves

We send herewith by way of service on you the following documents:

(1) Concurrent Writ of Summons (Enclosure 145)

(2) Notice of Concurrent Writ of Summons

(3) Request for Service of Document Abroad

(4) Order dated 11th December 2000 (Enclosure 149).

Yours faithfully,

Sgd: (Illegible)

**[26]** The plaintiff seeks to submit that the third attempt at service was not in fact an attempt at service. The plaintiff submits that the third attempt at service was actually just a notification to the first defendant of the existence of the suit. These submissions have been repeated in the affidavit of Choy Khai Leong that was affirmed on 18 September 2001 as seen in enclosure 174 particularly at paragraph 8 thereto. But the first defendant disputes these submissions. Indeed if the legal documents were served by the plaintiff in the second attempt – this was approximately on 7 February 2000, then the following germane questions would arise:

(1) Why did the plaintiff wait for the first defendant to enter a conditional appearance on 2 July 2001 as per enclosure 158 which was over 17 months later – close to 1½ years later? and

(2) Why did the plaintiff not file for judgment instead of waiting for 17 months when the first defendant had entered a conditional appearance and when the first defendant had applied to set aside service?

**[27]** Now, if the second attempt was considered as good service, and if this service took place on 7 February 2000 as affirmed by way of an affidavit, then how does the plaintiff account for the following state of affairs:

(a) Why did the plaintiff affirm an affidavit in enclosure 155 on 9 May 2001? That enclosure 155 is the plaintiff's affidavit and it expressly states that service had not been performed as at 9 May 2001 (see paragraphs 5, 6 (mistakenly numbered 8), 8 and 10).

(b) Again by way of enclosure 155 (which was an affidavit in support of an application to renew the writ after 7 February 2000), *the plaintiff expressly affirms in paragraph 8 to the following effect*:

> Saya sesungguhnya menyatakan bahawa writ telahpun dihantar melalui kourier dengan tujuan menyerahkan writ kepada defendan pertama pada 3.5.2001. Plaintif masih tidak tahu samada writ telahpun diserah atau tidak. Oleh yang demikian plaintif terpaksa memohon untuk perbaharuan writ tersebut.

*And this passage in Bahasa Malaysia gave the inkling that the plaintiff was* still unsure as to whether the writ had been served on the first defendant or otherwise. This passage too clearly and indisputably shows that the plaintiff was making reference to the third attempt at service.

(c) Why did the plaintiff continue to renew the writ after 7 February 2000 for the express purpose of serving the writ onto the first defendant? There was no reason to renew the writ if the first defendant had already been served on 7 February 2000 bearing in mind that all the other defendants had been served.

**[28]** All these arguments would aptly apply to the following affidavits filed by the plaintiff.

(i) the affidavit affirmed by Thangasvari a/p Suppiah on 17 February 2000 as seen in enclosure 138 particularly at paragraph 5 thereto – which was annexed to the notice of intention to use an affidavit as per enclosure 180;

(ii) the affidavit affirmed by Thangasvari a/p Suppiah on 6 November 2000 as seen in enclosure 148 particularly at paragraphs 6 and 7 which expressly state that service was not successfully performed on the first defendant – this very affidavit was annexed to the notice of intention to use an affidavit as per enclosure 180; and

(iii) the affidavit affirmed by Thangasvari a/p Suppiah on 20 February 2001 as seen in enclosure 152 in support of an application to renew the writ in order to enable service on the first defendant as reflected in paragraph 5 of enclosure 152 – again this very affidavit was annexed to the notice of intention to use an affidavit as per enclosure 180.

**[29]** It is the submission of the first defendant that by virtue of all the above affidavits, the plaintiff cannot properly maintain or be heard to

maintain that the third attempt at service was not an attempt at service but was merely to inform the first defendant of the existence of the suit. This is indeed the correct submission of the first defendant since the affidavits filed by the plaintiff reflect the true intention of the plaintiff.

**[30]** The plaintiff too cannot also be heard to maintain that the second attempt at service was proper service. The reasons are quite similar. The plaintiff has expressly deposed to the contrary in its affidavits. It must be borne in mind that the plaintiff has filed an application after 7 February 2000 to renew the writ for the sole purpose of enabling service on the first defendant. The plaintiff cannot now be heard to state otherwise.

**[31]** It is the submission of the first defendant that the memorandum of conditional appearance that appears in enclosure 158 was entered pursuant to the third attempt at service by way of courier dated 3 May 2001 which the first defendant received on 8 May 2001 (see exhibit 'MI-1' of enclosure 165). It is by way of this service that the first defendant had 60 days to enter an appearance. This period would have expired by 8 July 2001. And the first defendant entered a conditional appearance by 2 July 2001. This was certainly within the 60 days' time period to enter an appearance from 8 May 2001. The first defendant then applied to set aside service as reflected in enclosure 164.

**[32]** The plaintiff is adamant and it maintains that the third attempt at service was good. The first defendant by way of a rebuttal refers to O 11 r 5(3) of the RHC and argues that the third attempt was not good service. In any event, the plaintiff through Choy Khai Leong has affirmed an affidavit on 18 September 2001 as per enclosure 174 at paragraphs 8 and 9 expressly stating that the third attempt was not proper service.

**[33]** Mr Rishwant Singh, the learned counsel for the first defendant, points out that the plaintiff has treated the second attempt at service as bad and that being the case he submits that the only issue that this court ought to determine would be whether the second attempt at service is good service. Now, in order to constitute good service, the plaintiff would have to serve the required legal documents pursuant to the Malaysian law and the rules of service as set out in O 11 of the RHC.

**[34]** It is pertinent to state that O 11 r 5 of the RHC provides for service of notice of the writ abroad. *While O 11 r 5(2) of the RHC expressly states that:*

> Nothing in this rule or in any order or direction of the court made by virtue of shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.

*I have stated in the early part of this judgment that there is only one proper mode of service* of foreign process in Japan. Even the Japanese solicitors gave the same advice to the plaintiff's solicitors as seen in the correspondences that have been reproduced earlier. The proper mode of service of foreign process in Japan would be in this manner: through the competent District Court, by special mail service and through the Japanese Supreme Court.

**[35]** In my judgment, the second attempt at service is certainly bad for the following reasons. The plaintiff through the affidavit of Thangasvari a/p Suppiah that was affirmed on 6 November 2000 as seen in enclosure 148 exhibited a letter dated 15 May 2000 marked as 'TS-19' from Wisma Putra, Ministry of Foreign Affairs to the Registrar of the Federal Court. Paragraph 3 of that letter reads as follows:

> Walaubagaimanapun pihak defendan Nippon Seiko KK telah mengembalikan semula dokumen-dokumen yang berkaitan atas alasan bahawa dokumen-dokumen tersebut adalah tidak lengkap dan (tidak) teratur kerana tiada tarikh dan tanpa tandatangan …

**[36]** The English translation of this Malay text may be stated in this way:

> However, the defendant Nippon Seiko KK has returned back those documents on the grounds that those documents were incomplete and not organised since they were undated and unsigned …

**[37]** This very letter constitutes contemporaneous correspondence and it supports the first defendant's stand. Even in the affidavit of Masao Ito that was affirmed on 24 August 2001 as seen in enclosure 172, at paragraph 12 thereto, Masao Ito states that the documents purportedly served by the second attempt were incomplete, unsigned and undated.

**[38]** Now, the plaintiff too by its conduct after the second attempt at service also demonstrates that the second attempt at service was bad. A battery of questions arise. How else can the plaintiff explain why it continued to renew the writ? How else can the plaintiff explain why it affirmed affidavit after affidavit to state how it proposed to serve the first defendant? How else can the plaintiff explain why it expressly affirmed by way of affidavits that service on the first defendant had yet to be performed?

**[39]** I will now refer to two authorities. The first would be the case of *Ong & Company Pte Ltd v Carl YL Chow* [1987] 2 MLJ 430 at 431, where Chan Sek Keong JC said:

> Rule 5(1) and (2) of Order 11 provide that service of a notice of writ is by personal service provided it is not contrary to the law of the country where service is to be effected. Rule 5(1) does not expressly say that such personal service may be effected by a private arrangement between the plaintiff and his agent in the country where service is to be effected. The service of a writ is an exercise in judicial power. The judicial power of a state can only be exercised within the territorial limits of the state over which the courts have jurisdiction. As Cotton LJ said in *Re Busfield* (1886) 32 Ch D 123:
>
> > 'Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction … A Court has no power to exercise jurisdiction over anyone beyond its limits.'
>
> In other words, the judicial power of one State cannot be extended or exercised in another independent State except with the consent of that State. The reason is that it encroaches upon the sovereign rights of the other State. As was said by Lord Denning in *Afro Continental Nigeria Ltd v Meridian Shipping Co SA* (*The 'Vrontados'*) [1982] 2 Lloyd's Rep 241:

> '... service of a writ out of the jurisdiction is an exercise of sovereignty within the country in which service is effected. It can only be done with the consent of that country. That is why our rules provide for service through the judicial authorities of that country or through a British Consular authority in that country, see RSC O 11 rr 5(5) and (6).'

The relevant rules in Order 11 of the 1970 Rules differ slightly from the English Order 11, but provision is made in rule 6(2) for service (i) through the government of that country where that government is willing to effect service; or (ii) through a Singapore Consular authority in that country, except where service through such an authority is contrary to the law of that country. Order 11 rule 5(8) in fact sets out the agreements of two foreign governments, *viz*, Malaysia and Brunei to allow Singapore parties to effect service of process in the manner set out therein. I do not think it is an alternative mode of service outside the jurisdiction. The reason why this subrule should appear before rule 6(2) was due to the adoption of the 1970 Rules whereas rule 5(8) was a re-enactment of the former Order 11 rule 8 of the Rules of the High Court 1934.

**[40]** The second would be the case of *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146, SC, where the respondent there tried to serve a third party notice on the appellant there in New York, USA through the respondent's agent in the USA. Peh Swee Chin SCJ (as he then was) speaking for the then Supreme Court aptly said at p 151 of the report:

> In the instant appeal, it was common ground and we accepted that in the USA, there did not subsist the Civil Procedure Convention, therefore Order 11 rule 6(2) applied. The service of the notice of writ herein would have to be effected through the Government of the USA or through our Malaysian consular authority contrary to what was ordered and done in this case, as stated above.

**[41]** Mr Rishwant Singh, in style, submits that the plaintiff's second attempt did not comply with the rules of service in Malaysia for the following reasons:

(1) a copy of the notice of the concurrent writ of summons to be served out of jurisdiction did not state the date of issue and it was unsigned and unsealed by the High Court and it was also unsigned by the plaintiff's solicitors;

(2) a copy of the notice of the concurrent writ of summons to be served out of jurisdiction was undated, unsigned and unsealed by the court; and

(3) two copies of the High Court order dated 23 December 1997 were unsealed and unsigned by the High Court and unsigned by the plaintiff's solicitors and these two copies of the High Court order appear to grant leave:

   (a) to the plaintiff to issue and serve the concurrent writ of summons where the notice of which is to be served out of jurisdiction against the first defendant;

   (b) to the plaintiff to issue and serve the notice of the concurrent writ of summons on the first defendant's address in Japan or such other place in Japan; and

(c) that the time period for the first defendant to enter an appearance would be 60 days from the date of service of the notice of the concurrent writ of summons.

**[42]** I wholeheartedly agree with the sound submissions of Mr Rishwant Singh.

**[43]** I must categorically say that the drafts of the legal documents which were sent but not served by the plaintiff did not comply either with the laws of Malaysia or the laws of Japan. O 92 r 2 of the RHC states as follows:

> 2 Seal of the Court (O 92 r 2)
>
> Every document issued by the Registry for which a Form marked with the word 'seal' as prescribed in Appendix 'A' must bear the seal of the Court.

**[44]** Of pertinence it would be ideal to refer to the case of *Maclaine Stokvis (Malaya) Ltd v The Saloma Company* [1959] MLJ 241. That was a case where the defendant there applied for an order that the service of the writ be set aside because the statement of claim was not signed by the plaintiff's solicitors. The writ was a specially indorsed writ which meant that the writ did not have a general indorsement. The learned judge in the person of Syed Sheh Barakbah J (as he then was) adjudicated the case and he was of the view that as the statement of claim was not signed by the plaintiff's solicitors, it was a nullity. Next, reference to the case of *Cheang Chan as Chairman of Perak Kwong Sai Association v Lee Kin Kok* [1959] 2 MLJ 242 should be made. In that case the defendant applied to set aside the writ of summons because the statement of claim was not signed by the plaintiff's solicitors. The writ was generally indorsed and because of this, Neal J was of the view that the case of *Maclaine Stokvis (Malaya) Ltd v The Saloma Company* (supra) could be distinguished on the facts.

**[45]** I have seen exhibit 'MI-3' of the affidavit of Masao Ito as seen in enclosure 172 which clearly showed that during the second attempt the cause papers were unsigned and unsealed. Now, after the second attempt, the plaintiff once again attempted service via the third attempt. I say that the conclusion here is quite clear. The plaintiff was certainly aware that its second attempt was invalid. As such it was no surprise that the plaintiff applied to renew the writ after 7 February 2000 and thereafter attempted service on the first defendant as per the third attempt. But unfortunately the third attempt too did not meet with the requirements of the law. The plaintiff was aware of this unfortunate state of affairs and so, in 2001, the plaintiff filed a further application to renew the writ. It must be emphasised that the plaintiff had served the writ of summons on the second and the third defendants at this point of time but, to date, service has yet to be effected on the first defendant.

*The Renewal of the Writ of Summons and the Period of Limitation*

**[46]** The discretion to renew the writ should not be exercised in favour of the plaintiff. The reasons are manifold. Suffice for this exercise to say that:

(1) The plaintiff's cause of action accrued on or around 14 July 1987 as reflected at paragraph 5 of the statement of claim. Since the plaintiff's action is based on the breach of both contract and tort, the six (6) years' period of limitation should expire on or around 14 July 1993.

(2) As a result of many renewals, the defence of limitation that was once available to the first defendant cannot now be raised by the first defendant. The first defendant has suffered serious prejudice as a result of the many renewals of the writ of summons over the twelve (12) years' period. A protracted period of time. And limitation should be a factor to take into consideration in any application for the renewal of the writ of summons.

**[47]** I will now refer to an array of authorities. For starters, I would refer to the case of *Battersby & Ors v Anglo-American Oil Company, Limited & Ors* [1944] 1 KB 23, CA, where the headnote at p 23 states as follows:

> The court will not exercise its discretion in favour of the renewal of a writ after the period allowed for service has expired, nor allow an amendment of pleadings to be made, if the effect of doing so will be to deprive a defendant of the benefit of a limitation which has accrued.

**[48]** *Battersby* (supra) was a decision of the Court of Appeal with a coram of Lord Greene MR, Lord Goddard and du Parcq LJJ. And writing for the Court of Appeal, Lord Goddard LJ at p 29 said:

> As we have just said, there is a consistent line of authority that the court will not extend the time in such cases, so as to deprive the defendant of the benefit of the statute. The first case is *Doyle v Kaufman* 3 QBD 7, 340. In the Divisional Court, Cockburn CJ, with whom Lush J concurred, said 3 QBD 8: 'The power to enlarge the time given by Or. 57, r. 6' (now Or. 64. r.7) 'cannot apply to the renewal of a writ when, by virtue of a statute, the cause of action is gone.' Perhaps it might have been more accurate to say 'when the remedy is barred,' but the effect is the same.

Continuing at p 31 to p 32 of the report, Lord Goddard LJ said:

> In *Holman's* case [1944] KB 591, 594 the court referred to *Mabro v Eagle Star and British Dominions Insurance Co* [1932] 1 KB 485, 487, where the court refused to allow a person to be added as a plaintiff to an action if thereby the defence of the statute would be defeated, and did so for precisely the same reasons as were given in the earlier cases which we have set out above. Scrutton LJ said:
>
> 'The court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the court to disregard the statute.' That, if we may say so, puts the reason underlying the rule clearly and emphatically. In the present case the court is apprised of the fact that the period of limitation had run when the application for renewal was made. To grant the renewal would, therefore, be to disregard the statute, which no court has a right to do merely because its operation works hardship in a particular case. The passage from the judgment

of Greer LJ cited by the court in *Holman's* case (1944) KB 591, 594 appears to us to be equally conclusive against the present application. In our opinion, what Greer LJ meant was that, even assuming the words of the particular rule confer a discretion, it is one which can be exercised only in one way if an exercise in the other direction would deprive a party of a legal defence.

And finally at p 32 of the report, Lord Goddard LJ rounded it up by saying:

We conclude by saying that, even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order.

**[49]** It is interesting to note that *Battersby* was referred to and applied by Justice Kerr in the case of *Schothorst and Schuitema v Franz Dauter GmbH (The 'Nimrod')* [1973] 2 Lloyd's Law Reports 91. *Battersby* too was applied by Chua J in the Singapore Court of Appeal (with the coram of Kulasekaram, Chua & Rajah JJ) in the case of *Syn Min Kong Sdn. Bhd v Hua Seng Sawmill Co Bhd* [1981] 1 MLJ 269, and the headnote at p 269 reads as follows:

**Held**, allowing the appeal: (1) the rules governing the extension of time are contained in RSC 1970 Order 6 rule 7(2). In seeing whether the discretion should be exercised under that rule it must be remembered that at the time of the hearing of the application to renew the writ the cause of action to which the writ relates had become time-barred. The appellants in this case had one year to issue their writ. If they had issued it within that one year, they have another twelve months within which they could serve the writ. If they require to extend it for a further time before service, they ought to show sufficient reason for an extension of time.

**[50]** *Battersby* was also considered by the then Federal Court in the case of *Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27 with a coram of Ong Hock Sim, Raja Azlan Shah and Chang Min Tat FJJ. Delivering the judgment of the then Federal Court, Chang Min Tat FJ (as he then was) allowed the appeal and he held (see the headnote at p 27 of the report):

(1) the court had jurisdiction to renew the writ in this case but even if the application is made within twelve months of the date of issue the jurisdiction should not be exercised in all cases and indiscriminately but only where there are good reasons to excuse the delay in service;

(2) in this case no reason had been advanced for the exercise of the court's discretion in renewing the writ and the discretion ought not to have been exercised.

**[51]** Chua J in the Singapore High Court in the case of *New Ching Kee v Lim Ser Hock* [1975] 2 MLJ 183, after applying *Battersby* held that (see the headnote at p 183 thereto):

A (1) in the absence of sufficient or good reason, the court will not exercise its discretion in favour of the renewal of the writ after the period allowed for service has expired, if the effect of doing so will be to deprive a defendant of the benefit of a limitation period which has accrued;

(2) in this case the appellant's solicitor had not acted reasonably in the matter and had been negligent in not serving the writ in time;

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(3) there was also no sufficient or good reason for extending the validity of the writ in this case and therefore the appeal must be dismissed.

**[52]** Syed Agil Barakbah J (as he then was) in Alor Setar High Court in the case of *Lee Kah Hong & Anor v Teoh Tiang Guan & Anor* [1971] 2 MLJ
C 223 also applied *Battersby* and his Lordship held that (see headnote at p 223):

… the discretion to renew the writ and enlarge the time would not be exercised in the plaintiffs' favour as to do otherwise would deprive the second defendant of the benefit of a limitation which had accrued well before the application for extension was made.

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**[53]** It is noteworthy to mention that in the plaintiff's various applications for renewal of the writ of summons, the court has not been informed of the prejudice suffered by the first defendant as a result of the renewal of the writ of summons and that would be that the first defendant has been deprived of its right to a defence of limitation. This very apt defence is no longer open
E to the first defendant. I am of the view that I have the jurisdiction to set aside the various renewals of the writ of summons that were granted and were meant for the first defendant. It would be germane to mention that the plaintiff's affidavits in support of its various applications for the renewal of the writ of summons do not and did not demonstrate good or sufficient reasons for the court to exercise its discretion to renew the writ of summons.

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**[54]** Chronologically speaking from the events relating to the service of the legal documents, it becomes clear for everyone to discern that:

(i) There is no evidence that the plaintiff tried to serve the first defendant in 1990. This was the very year following the issuance of the writ in this
G suit.

(ii) In the years ensuing particularly in 1992, 1993 and 1995, there was a total of four (4) letters from the plaintiff's solicitors to the Supreme Court and the Jabatan Kehakiman Malaysia in regard to the issue of service of the legal documents.

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(iii) There is no evidence at all of any attempt at service made by the plaintiff for the year 1994.

(iv) There is also no evidence of any attempt at service made by the plaintiff for the following years ensuing, namely, 1996, 1997, 2000 and 2001.

I **[55]** All these reasons, when combined cumulatively, would upset the plaintiff's contention that it has acted reasonably in all the circumstances to serve the process on the first defendant within the twelve (12) year period.

*Rebuttals of the Arguments Advanced for and on behalf of the Plaintiff*

**[56]** The plaintiff submits that it was successful in serving process on the first defendant in Japan on 7 February 2000. This relates to the second attempt at service on the first defendant. Unfortunately, the plaintiff's submission is not consistent with the affidavits which the plaintiff has filed in this action. I must elaborate further.

**[57]** Now, enclosure 180 is the first defendant's notice of intention to refer to certain affidavits. Enclosure 180 consists entirely of affidavits affirmed by the plaintiff and read and relied upon by the plaintiff in its application in enclosure 164 which finally culminates in enclosure 176. Enclosure 180 consists of four (4) affidavits affirmed by the plaintiff and filed by the plaintiff in this court and a solitary order of the High Court and they may be stated as follows:

(i) the affidavits of Thangasvari a/p Suppiah affirmed on
   (a) 17 February 2000;
   (b) 6 November 2000;
   (c) 20 February 2001;
   (d) 9 May 2001; and

(ii) an order of the High Court dated 7 April 2000.

**[58]** To say as was said by the plaintiff that the plaintiff was successful in serving the legal documents would run counter to and be at variance with the affidavits affirmed and filed by the plaintiff and with the sealed order of the court drawn up by the plaintiff. The following events must be highlighted and put in the forefront:

(1) Ten (10) days after 7 February 2000, the plaintiff affirms and files an affidavit on 17 February 2000. The plaintiff, at paragraph 5 of that affidavit, affirms on oath that process has not been served on the first defendant. The plaintiff seeks for leave to renew the concurrent writ of summons.

(2) Enclosure 139 is an application of the plaintiff for leave to renew the writ and for leave to serve the writ. The date of the plaintiff's application is stated to be on 18 February 2000. The plaintiff's application was filed on 18 February 2000 and calculation-wise this was eleven (11) days after 7 February 2000.

(3) Enclosure 180 is yet another affidavit filed by the plaintiff. This affidavit was affirmed on 6 November 2000 which was about nine (9) months after 7 February 2000. At paragraph 6 of the affidavit in enclosure 180, the plaintiff deposes to the fact that the writ was returned by the Malaysian Foreign Ministry vide letter dated 15 May 2000. Exhibit 'TS-19' of enclosure 180 is the letter from the Malaysian Foreign Ministry and paragraph 3 of that letter has been reproduced in the early part of this judgment which briefly alludes to the documents which were said to be defective and they were returned accordingly.

(4) Approximately one (1) year later, the plaintiff again deposes an affidavit on 20 February 2001 as seen in enclosure 152 and filed in court on the next day – 21 February 2001. Now, at paragraph 5 of this affidavit, the plaintiff asks for leave to renew the writ for the express purpose of service. The plaintiff refers to the 60 days' period within which the first defendant was supposed to enter an appearance.

(5) Later, one (1) year and three (3) months down the road, the plaintiff files yet another affidavit affirmed on 9 May 2001 as seen in enclosure 155. At paragraph 7 of this affidavit, the plaintiff affirms that it has done its level best to serve the writ but has been unable to do so. And at paragraph 8 of this affidavit, the plaintiff expressly deposes to the fact that on 3 May 2001 the plaintiff has sent the writ by courier to Japan by way of service but does not know if the writ was served. Ignorance must have been bliss.

Events, however, have shown that the first defendant had received the writ vide the third attempt at service by courier direct from the plaintiff's solicitors. As deposed to in the first defendant's affidavit, the plaintiff attempted to use the courier service to serve the first defendant. And when the first defendant received the purported service of the writ by the courier in the third attempt, the first defendant was advised by its Malaysian solicitors to enter a conditional appearance and set aside the purported service. With all these factual matrix, it is my judgment that the learned deputy registrar was in error when she refused to set aside the service. The service ran counter and was contrary to the Japanese Law and the Japanese Code. Consequently, the appeal in enclosure 176 should be allowed with costs.

(6) The court order dated 8 April 2000 can be seen in enclosure 142. This court order was made at the behest of the plaintiff. By this court order the plaintiff has been given leave to renew the writ and leave was also given to serve the writ on the first defendant out of jurisdiction. By this court order, the first defendant was given sixty (60) days after service to enter an appearance.

**[59]** I pause here to make a salient observation. Thus far, what must be observed from all these affidavits that were filed by the plaintiff is that service *never* took place on 7 February 2000 as the plaintiff now maintains in its submissions. The plaintiff should be estopped from making and adopting a line of submissions that run counter to its affidavits. I say that the plaintiff now relies on the service effected on 7 February 2000 because it has come to realise that the third attempt at service by way of direct courier was wrong in law and must be struck down as bad service.

**[60]** It must be borne in mind that the affidavits affirmed by the plaintiff together with the court order as alluded to earlier and as found in enclosure 180 – the notice of intention to use affidavits, have not been challenged by the plaintiff. It would certainly be difficult for the plaintiff to challenge its own affidavits and the court order that arose from its own initiative.

**[61]** It is part and parcel of my judgment that it is an abuse of the process of the court at the very least and if not contemptuous on the part of the plaintiff to now maintain that service of the legal documents had been performed on 7 February 2000 when the plaintiff, in itself, has affirmed to the contrary on at least four (4) separate occasions in affidavits filed in the registry of this court. With respect, the plaintiff cannot blow hot and cold. The plaintiff likewise is estopped from maintaining that service had been effected on 7 February 2000.

**[62]** In *Low v Bouverie* [1891] 3 Ch 82, CA at 105, Bowen LJ was of the view that estoppel was only a rule of evidence and that one cannot found an action upon estoppel. This same view was shared by Lindley LJ at p 101 of the same case – referring, of course, to *Low v Bouverie*. This simple principle of law was also cited with approval by Hodson LJ in *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247 at 252, 253, [1956] 1 WLR 29 at 39, 40, CA; and it was also reiterated by Bowen LJ in *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618 at 628, CA; and vigorously applied by Farwell LJ in *Harriman v Harriman* [1909] P 123, CA. The same principle of law was also applied in:

(a) *Brandon v Dowager Baroness Michelham* (1919) 35 TLR 617;

(b) *Re Sugden's Trusts, Sugden v Walker* [1917] 1 Ch 510, and on appeal vide [1917] 2 Ch 92, CA; and

(c) *H v H* [1928] P 206.

**[63]** In estoppel, a party is not allowed to say that a certain set of facts is untrue, whether in reality it is true or otherwise. By estoppel, one is forbidden in law to speak against one's own act or deed (*Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188 at 202, CA, per Bramwell LJ). Where a person by words or conduct represents to another a certain set of facts, clearly and unequivocally, with the knowledge of its falsehood or with the intention that it should be acted upon, and the other has acted on the representation and accordingly changed his position to his prejudice, then an estoppel would arise and the representor is not allowed to say that the fact is otherwise than what he has represented it to be. Damning conduct may even constitute representation. Thus, mere silence or mere inactivity when there is a duty to speak or act would also be fatal (*Hopgood v Brown* [1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223, CA). A clear and unequivocal representation must be established (*Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 768, [1972] 2 All ER 271 at 291, HL, per Lord Cross of Chelsea). The House of Lords in *Maclaine v Gatty* [1921] 1 AC 376 at 386, aptly said through Lord Birkenhead LC that:

> Where A by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time.

**[64]** Here, on at least four (4) separate occasions, the plaintiff had in clear and unequivocal words by way of affidavits affirmed that the legal

documents had not been served. Affidavits, once affirmed, would bind the deponents and the deponents cannot resile from them. The plaintiff must be estopped from submitting that the legal documents had been served on 7 February 2000 since the affidavits stated otherwise. It is as simple as that.

**[65]** I must proceed further. The first defendant's conditional appearance is in enclosure 158. This conditional appearance was dated 2 July 2001 and was entered after the plaintiff's purported service of process direct on the first defendant via courier. This conditional appearance was entered within the 60 days' period as ordered by the court. The plaintiff's affidavit in enclosure 165 at paragraph 4 makes this abundantly clear.

**[66]** It is with regret that I say that the plaintiff's submissions border on contempt. It stands on precarious ground. Very fragile and very nerve-wrecking. It is ideal to refer to the speech of Stephenson LJ in *Balogh v Crown Court at St Albans* [1975] QB 73 at 91 where his Lordship said that the contempt power is:

> ... salutary because it gives those who administer justice the protection necessary to secure justice for the public, dangerous because it deprives a citizen of the protection of safeguards considered necessary to secure justice for all.

**[67]** And the inherent jurisdiction of the court to summarily handle contempt of any kind has been described by Master Jacob (see (1970) 23 Current Legal Problems 23 at 28) as:

> … the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

**[68]** It goes without saying that the contempt law plays a key role in protecting the administration of justice. Everything would revolve on the facts. Factually speaking, the facts here are quite straight forward. I venture to elaborate:

(1) The plaintiff maintains that it received a certificate from the Malaysian Ministry of Foreign Affairs on 23 March 2000 certifying service on the first defendant.

(2) The plaintiff has after 20 March 2000 affirmed those affidavits as alluded to above and there the plaintiff clearly and categorically affirms on oath to the fact that service had not been performed on the first defendant.

(3) The plaintiff is estopped from relying on the letter dated 20 March 2000 emanating from the Malaysian Ministry of Foreign Affairs for the following reasons:

(a) On 15 May 2000, the plaintiff received another letter from the Malaysian Ministry of Foreign Affairs. This very letter was referred to in the plaintiff's affidavit affirmed on 6 November 2000 as seen in enclosure 148 that was annexed to enclosure 180. Now, this very letter makes it plain that the documents referred to in the Malaysian Foreign Ministry's letter

of 20 March 2000 were unsigned and unsealed. I say with some measure of certainty that it is trite law that the plaintiff must serve a signed, sealed and dated copy of the writ on the first defendant. And where the plaintiff fails to do this, the service fails simply because such service does not comply with our Malaysian law. In my judgment, such service is not service at all. It is bad service. It is, pure and simple, a nullity.

(b) I too say that the plaintiff's attempt at relying on the Malaysian Foreign Ministry's letter dated 20 March 2000 can be said to be belated, misconceived and done in bad faith. I say that it is made in bad faith because the plaintiff has affirmed several affidavits stating quite categorically that service had not been performed as at 7 February 2000. It must be borne in mind that the plaintiff has chosen not to disclose to this court evidence that was disclosed earlier in the plaintiff's affidavit referring to the Malaysian Foreign Ministry's letter of 15 May 2000 demonstrating, quite categorically, that service had not been effected on the first defendant.

(4) The plaintiff now seems to dispute the fact that the writ and the notice of the writ were not signed or sealed. I say that the plaintiff cannot now be heard to dispute this fact because it has affirmed an affidavit stating this to be the case. In disputing this fact, the plaintiff is treading on dangerous ground. It is not a well-trodden path. I believe the path chosen, borders on contempt. The plaintiff has filed affidavits stating to the contrary. For instance, in the plaintiff's affidavit in enclosure 148 which is annexed to enclosure 180 there is a letter from the Ministry of Foreign Affairs dated 15 May 2000 addressed to the Chief Registrar of the Federal Court marked as 'TS-19' which states that the documents attempted to be served were unsigned and unsealed and it was for this reason that the documents were returned. Incidentally, paragraph 3 of that letter has been reproduced earlier.

**[69]** In exhibiting that letter from the Ministry of Foreign Affairs marked as 'TS-19' of enclosure 148, the plaintiff accepts as a fact that the documents attempted to be served on 7 February 2000 were unsigned and unsealed. Having accepted this fact, the plaintiff then applies to renew the writ. The plaintiff also applies for leave to serve on the first defendant again and the plaintiff further affirms affidavits verifying the fact that service had not been performed as at 7 February 2000. It is trite law that affidavits must affirm matters of truth. If the plaintiff is found to affirm an affidavit containing half truths or mistruths, he is liable to be committed for contempt. So the plaintiff cannot now make a submission that the second attempt at service on 7 February 2000 was proper. In *Balogh v Crown Court at St Albans* [1975] QB 73, CA, Lord Denning MR held that contempt in the face of the court 'is the same thing as 'contempt which the court can punish of its own motion'. It really means contempt in the cognizance of the court'. But it is always prudent to exercise restraint. It is noteworthy to mention that the power to order committal is certainly wide. It is a power

that has to be exercised with care and circumspection (*Gay v Hancock* (1887) 56 LT 726 at 561, CA). The draftsmen of those affidavits relied upon by the plaintiff are expected to conduct themselves above board. There should not be deliberate deception to the court which would be contemptuous in nature. I need only to cite the case of *Linwood v Andrews and Moore* (1888) 58 LT 612. That was a case where a barrister was held guilty of contempt by being a party to the reading to the court of a false affidavit and for this deceit he was imprisoned. That was also a case where there was concealment of the true nature of the action so as to deceive the court. However, in the words of Lord Denning MR in *Abraham v Jutsun* [1963] 2 All ER 402 at 404, an advocate:

> '... is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court.

**[70]** Then there is the case of *R v Weisz, ex p Hector MacDonald* [1951] 2 KB 611, [1951] 2 All ER 408. In that case, the court held the solicitor to be in contempt for disguising the true nature of an action by means of a fictitious indorsement. The solicitor, upon being instructed by a client to file an action to recover a gambling debt which was unenforceable in a court of law by virtue of s 18 of the Gaming Act 1845, proceeded to do so. The indorsement stated that the debts were due on accounts stated and this was solely to disguise the true nature of the action. To this, Lord Goddard CJ said aptly:

> It is, in our opinion, beyond question that to disguise a cause of action so as to conceal its true nature when in truth it is one prohibited by statute is a contempt …

**[71]** All these are food for thought. The submissions of the learned counsel for the plaintiff are poles apart from the averments in the plaintiff's four (4) separate affidavits. It must be recalled that the submission was that service of the legal documents had been performed on the first defendant on 7 February 2000. In sharp contrast, the four (4) separate affidavits of the plaintiff showed that service of the legal documents on the first defendant had not been effected at all.

**[72]** At this juncture, it is appropriate to refer to the case of *Maritime (Pte) Ltd v ETPM SA* [1988] 2 MLJ 289, a decision of the High Court of Singapore. There the plaintiff applied to regularise the improper service. Here, on the other hand, the plaintiff maintains the service to be regular. There, the court in *Maritime* held that service of the writ on the defendant out of jurisdiction without leave was an irregularity that was curable. Here before me, I am dealing with two different modes of service:

(1) the third attempt by way of service which clearly conflicts with the law of Malaysia and the law of Japan in relation to service and must therefore be held to be a nullity; and

(2) the second attempt at service which was in the form of service of the unsealed and unsigned documents.

**[73]** All the authorities make it clear, on the balance of probabilities, that service of the unsigned and unsealed documents are classified as incurable irregularities in that such service would be considered as a nullity. Here, the plaintiff admits so much in its affidavits and the plaintiff too files applications to renew the writ in order to enable further attempts at service on the first defendant to be made. All those applications to renew the writ filed by the plaintiff here were designed to circumvent the limitation period. The court in *Maritime* was also concerned with service on the defendant's agent who was within the jurisdiction of the court. Whereas the plaintiff, in this case before me, has not applied to cure any irregularities in service. The plaintiff here steadfastly maintains that service was proper and that it was performed according to the laws of Malaysia and Japan. Therefore here, before me, the question of regularising the defects does not arise and can never arise. This is simply because the plaintiff here does not even admit to there being any defect in the service of those legal documents. As I said, the continuous renewals of the writ by the plaintiff here have the effect of depriving the first defendant of the defence of limitation. Here, the plaintiff has not denied, whether it be in its affidavit or by way of submission, that it did not draw this court's attention to the fact that limitation had set in when it made the many applications for the renewal of the writ over the twelve (12) years' period (1989 to 2001). So I say that those ex parte applications for renewal of the writ had prejudiced the first defendant and should be set aside. This is my judgment and I so hold accordingly.

**[74]** Here, the facts favour the first defendant and militate against this court in exercising its discretion to cure the defects in service and the defects in applying for renewal. The plaintiff here makes no admission as to these defects and the plaintiff too has not filed an application to regularise these defects. The salient facts would also show that the plaintiff has for several years made no attempt at serving process on the first defendant. The plaintiff's inconsistent stand is reason enough for me to refuse to cure the defects and, consequently, I must allow the first defendant's appeal in enclosure 176 with costs. The factual matrix of the present appeal are poles apart from the case of *Maritime*. I have endeavoured to set out the differences and these differences would surely set apart the present appeal from the case of *Maritime*.

**[75]** It is my judgment that the first defendant has a right, nay an inherent right, under the RHC to apply to set aside service. It is more in the nature of a substantive right that cannot be whittled away nor reduced in its might. The first defendant has already been deprived of the defence of limitation. The first defendant should not be prejudiced by being deprived of its right to set aside service which, in my judgment, is so patently wrong.

*Conclusion*

**[76]** The plaintiff who files the civil suit within the jurisdiction of Malaysia on the intended first defendant in Japan pursuant to the law of Japan must follow the following procedure. There must be compliance with the law of Japan and in order to comply with the law of Japan, service must be effected

on the first defendant through the Tokyo District Court, by special mail service and through the Japanese Supreme Court.

**[77]** Since Malaysia is not a signatory to the Civil Procedure Convention, the only one recognised mode of service is through the Tokyo District Court, by special mail and through the Japanese Supreme Court as stipulated in the Japanese Law – referring to the Law Relating To The Reciprocal Judicial Aid To Be Given At The Request Of Foreign Courts (Law No: 63 of the 38th year of Meiji (13 March, 1905), as amended by Law No: 7 of the 45th year of Meiji (29 March, 1912) and by Law No: 17 of the 13th year of Showa (22 March, 1938)), as well as the Japanese Code – referring, of course, to The Code Of Civil Procedure (Law No: 109, June 26, 1996).

**[78]** Now, since the procedure in which service was effected on the first defendant in Japan conflicts with the law of Japan, O 11 r 6(2)(b) of the RHC and O 11 r 5(2) of the RHC have not been complied with. Consequently, in my judgment, the service of process on the first defendant has not complied with the laws regulating service in Japan and Malaysia and, accordingly, I must set it aside.

**[79]** For the reasons as adumbrated above, I must reiterate that the first defendant's appeal in enclosure 176 must be allowed with costs. For the sake of expediency, I made an order that the case management in enclosure 177 between the plaintiff and the third defendant be held on 16 June 2004.

*Appeal allowed.*

Reported by AG Kalidas